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Charge Conference

1 UNITED STATES OF AMERICA
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 371 (RA)

5 JOHN GALANIS, et al.,

6 Defendants.

7 -----x

8 New York, N.Y.

9 June 22, 2018

11:00 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13 APPEARANCES

14 ROBERT KHUZAMI,
15 Acting United States Attorney for the
16 Southern District of New York

17 BY: BRENDAN F. QUIGLEY,
18 REBECCA G. MERMELSTEIN,
19 NEGAR TEKEEI,
20 Assistant United States Attorneys

21 PELUSO & TOUGER
22 Attorneys for Defendant John Galanis
23 BY: DAVID TOUGER

24 BOIES, SCHILLER & FLEXNER LLP (NYC)
25 Attorneys for Defendant Devon Archer
BY: MATTHEW LANE SCHWARTZ
LAURA HARRIS
CRAIG WENNER

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1 Appearances (Cont'd)

2
3 PAULA J. NOTARI

4 Attorney for Defendant Bevan Cooney

5 - and -

6 O'NEILL and HASSEN

7 Attorneys for Defendant Bevan Cooney

8 BY: ABRAHAM JABIR ABEGAZ-HASSEN

9
10 Also present: Kendall Jackson, Paralegal

11 Ellie Sheinwald, Paralegal

12 Eric Wissman, Paralegal

13 Special Agent Shannon Bienick, FBI

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1 (Trial resumes)

2 (In open court; jury not present)

3 THE COURT: Good morning, everyone. You may be
4 seated. Are we waiting for anybody?

5 MR. QUIGLEY: Not from the government.

6 THE COURT: All right.

7 MR. TOUGER: This is off the record.

8 (Off-the-record discussion)

9 THE COURT: That is fine. I just wanted to make sure.
10 I thought we were waiting for him, but I am glad we can
11 proceed.

12 So I obviously circulated a draft charge last night.
13 I'm happy to go through any objections that you have. I think
14 we probably should send back a copy of the indictment unless
15 there is a strong objection. Obviously, it needs to be
16 redacted. Then there are certain things in the charge I am
17 sure you saw. I instructed on Count 2 first and then Count 1.
18 We could change the order in the indictment. I don't think
19 that is necessary.

20 MR. QUIGLEY: I don't think so, your Honor.

21 THE COURT: I thought it was easier to do that way.
22 There are a number of proposed instructions that I didn't
23 include that if anyone has an objection to, you can let me
24 know.

25 Immunity was something that I wanted to make sure the

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1 language that I used was accurate. I took out references to
2 non-proses because I don't think anyone got a non-pros, did
3 they?

4 MR. QUIGLEY: That's right. We have a couple of
5 exhibits.

6 THE COURT: The safe harbor, I don't know if you
7 wanted to add that in. We'll talk about that.

8 I changed the proposed interstate commerce instruction
9 a little bit and used a more standard one, but again I am open
10 to discussing that. We need to add in Dr. Archer's testimony
11 in terms of character, a character witness.

12 I didn't know if you needed specific investigative
13 techniques. Why don't we go through it and let me know. Who
14 wants go first with their objections?

15 MR. QUIGLEY: It makes sense to go through by page.

16 THE COURT: Sure. Why don't you start, Mr. Quigley,
17 and just go and page-by-page.

18 MR. SCHWARTZ: Can I ask you to identify the charge
19 because I am looking at a red-lined item. I didn't have time
20 to go back to the original.

21 THE COURT: Sure. While you're going through it, let
22 me say this about motions. It may be best -- I am open to
23 whatever the defense wants -- it may be best to just hold off
24 until after the jury comes back, and if there are convictions,
25 then we can discuss if you want to do something in a written

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1 format or orally.

2 MR. TOUGER: That would be my request.

3 THE COURT: Your preference?

4 MR. TOUGER: Yes.

5 MS. NOTARI: Mine as well.

6 MR. SCHWARTZ: I am happy to do anything. I want to
7 be practically-minded as long as I am fully reserved.

8 THE COURT: You're fully reserved, no doubt about
9 that. The record is clear. I think that is the best practice.

10 MR. QUIGLEY: We would obviously agree with that. It
11 is not our motion.

12 THE COURT: I wanted to get that out of the way
13 because it affects the timing.

14 MR. QUIGLEY: So on the record is reserved.

15 THE COURT: What page?

16 MR. QUIGLEY: Page 11.

17 THE COURT: Okay.

18 MR. QUIGLEY: Actually, Page 12, circumstantial
19 evidence is as valuable as direct evidence. Just a minor
20 comment, but the last sentence based on all the evidence or
21 lack of evidence in the case, circumstantial and direct.
22 Perhaps it should read circumstantial or direct.

23 THE COURT: Okay.

24 MR. QUIGLEY: Then Page 14, cooperating witness
25 testimony.

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1 MR. TOUGER: The name?

2 THE COURT: If it is about that thing, you can, but I
3 will give you the opportunity to make any objections you want
4 to make as well.

5 MR. TOUGER: The only thing on circumstantial evidence
6 is I would ask that the following language which comes from
7 United States versus Glenn, 312 F.3d 58, at Page 70 (2d Cir.
8 2002), also given by the Honorable Robert P. Patterson in
9 United States versus Martinez Sandoval, 01 Cr. 307, and the
10 language is that where two equally strong inferences can be
11 drawn from the same facts, one favorable to the prosecution and
12 one favorable to the defendant, then you should draw the
13 inference that is favorable to the defendant. It is for you
14 and you alone to decide what inferences you will draw.

15 THE COURT: I am not inclined to add that language,
16 but I will take a look at it and I'll think about it. I will
17 see if there are other charges that have used that. I am not
18 inclined to include that. I don't believe I have ever included
19 that in a charge before, but I will consider it.

20 MR. QUIGLEY: Just for the record, we object to that.

21 Page 14, cooperating witness testimony. So you have
22 also heard from a witness who testified that they were -- I
23 don't know if your Honor was -- it was he.

24 THE COURT: That he was.

25 MR. QUIGLEY: He was.

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1 THE COURT: We only had Dunkerley?

2 MR. QUIGLEY: Right. Then it says the witness has
3 agreed to testify and cooperate with the government in exchange
4 for the government's agreement to ask the court to give him a
5 lighter sentence than he would otherwise receive.

6 I think that misstates the cooperation agreement. He
7 was very clear and consistent with the standard cooperation
8 agreement in this district, he received no promise of any
9 particular sentence. The more standard language is he agreed
10 to testify and cooperate with the government in the hopes of
11 receiving a reduced sentence.

12 MR. TOUGER: I also argue the government has agreed to
13 put in a 5K1 letter. They have agreed to allow the court to
14 give him a reduced sentence.

15 MR. QUIGLEY: If he complies with his cooperation
16 agreement. The cooperation agreement is not complete yet and
17 we don't -- he was very clear, and again it is standard with
18 all cooperators in this district, that the Judge ultimately
19 determines his sentence. The government never asks in the 5K
20 letter for any particular sentence. In 25, 35 5K letters we
21 have never asked for a particular sentence. That is the way it
22 works.

23 MR. SCHWARTZ: Section 5K1.1 of the guidelines is a
24 section about downward departures from the guideline range. It
25 is apparently about seeking a lighter sentence. Of course, it

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1 is true that the government's obligations aren't triggered
2 unless the other side lives up to their obligations, but that
3 is true of any contract.

4 If one side breaches a contract, the other side
5 doesn't have to perform. The law is clear cooperation
6 agreements are contracts and the essential benefit of the
7 bargain is testimony in exchange for 5K1 letter, meaning a
8 request for lighter sentence. Your Honor has gotten it exactly
9 right.

10 THE COURT: This is the language you had proposed, not
11 surprisingly, but I will consider your arguments with respect
12 to.

13 MR. QUIGLEY: Thank your Honor.

14 So immunity, Page 16, paragraph N, you have heard
15 testimony of witnesses who testified under a grant of immunity
16 from this Court, and then the next sentence begins with, with
17 respect to both categories of witnesses. That is left over
18 from when it is referred to both immunity and non-pros, so that
19 first clause should be stricken.

20 THE COURT: Right. Right. Just start with "this
21 means that."

22 MR. QUIGLEY: What this means is the testimony of the
23 witness will not be used against him in any criminal case
24 exception a prosecution for perjury or false statement.

25 MR. SCHWARTZ: While we are looking at that charge, a

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1 minor language point, if we can change "this Court" to "the
2 Court."

3 MR. QUIGLEY: That is fine with us.

4 THE COURT: Sure.

5 MR. SCHWARTZ: That appears two or three times just in
6 the immunity section.

7 THE COURT: I see it twice, but I am happy to make
8 that change.

9 MR. SCHWARTZ: Three times, on the second line from
10 this Court.

11 THE COURT: Where is the third? So I see it in the
12 first sentence.

13 MR. SCHWARTZ: In the last two --

14 THE COURT: I see. It is the last, got it, I see,
15 okay.

16 MR. SCHWARTZ: Then the second line in the second
17 paragraph, right.

18 THE COURT: Yep, got it. Okay. Thanks.

19 MR. QUIGLEY: Then the same instruction, final
20 paragraph, however, the testimony of a witness who has been
21 granted immunity should be examined closely to determine
22 whether or not it is colored in such a way as to place guilt
23 upon a defendant in order to further the witness' own
24 interests. For that not being in there, the objection is more
25 to the next sentence, such testimony should be scrutinized with

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1 you with great care and you should act upon it with caution.

2 I think generally a standard credibility instruction
3 is sufficient for all types of witnesses, and here it seems to
4 go well beyond that. I think certainly the first sentence of
5 that paragraph is sufficient to flag the jury's attention to
6 the potential biases of an immunized witness. I don't think it
7 is appropriate to say they should act upon it with caution. It
8 is any other witness.

9 MR. TOUGER: It is not any other witness. They're an
10 interested witness, and this is the standard I have seen many
11 times in this Court.

12 MR. QUIGLEY: They're not interested witnesses. They
13 have no interest in the outcome of the case.

14 MR. TOUGER: Okay.

15 MR. QUIGLEY: Their immunity is not at all dependent
16 upon the outcome of the case.

17 MR. TOUGER: Not the outcome, but interested witness
18 in keeping somebody happy.

19 MR. QUIGLEY: In telling the truth.

20 MR. SCHWARTZ: At least one of them testified
21 explicitly they hoped by coming in here testifying pursuant to
22 the grant of immunity, that would result in them not being
23 charged subsequently.

24 MR. TOUGER: Mr. Martin testified he is here to tell
25 the truth you want to hear.

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1 MR. QUIGLEY: We are fine with the first sentence.

2 The additional such testimony should be scrutinized by
3 you with great care and how you should act upon with caution
4 suggests these are super-special category of witnesses that I
5 don't think is really necessary.

6 MR. TOUGER: I have heard that charge in many
7 courtrooms in this Court, your Honor.

8 THE COURT: It is clearly appropriate in the context
9 of the cooperating witness or someone who gets a non-pros.

10 MR. TOUGER: In essence, Mr. Martin is getting a
11 non-pros. He is back in Spain where he can never, as he said,
12 he is perfectly safe. While they didn't give him a formal
13 non-prosecution, in reality, he is not going to get prosecuted
14 for this crime.

15 THE COURT: Look, my views, I don't think you need
16 both sentences, that it should be examined closely to determine
17 whether it is colored in such a way and it should be
18 scrutinized with good care. I think with great care and you
19 should act upon it with caution. I don't think we need both of
20 those because I think they're repetitive because the focus is
21 you should pay closer attention to this.

22 MR. QUIGLEY: That is okay. I don't think we need
23 both sentences.

24 THE COURT: I'll take out one of those two.

25 MR. QUIGLEY: We would prefer the second sentence be

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1 struck, the one with great care and caution.

2 THE COURT: I will look at those and I'll think about
3 it.

4 MS. NOTARI: I just think the second sentence is less
5 legal, less legalese, more user friendly.

6 MR. TOUGER: If you take out a sentence, the second
7 one is the one that should be taken out.

8 MR. SCHWARTZ: We leave it to your Honor to combine
9 the sentences appropriately.

10 THE COURT: I will do that. I will leave in the
11 notion they should examine this testimony closely, but I don't
12 think it needs to be repetitive.

13 MR. QUIGLEY: I just think Ms. Tekeei's point of our
14 original requested charge, I think some of this is left over
15 from when --

16 THE COURT: When there was a non-pros in the same
17 instructions?

18 MR. QUIGLEY: Right.

19 THE COURT: That is what my question was.

20 Also do you want to mention the safe harbor letter?
21 Is that necessary?

22 MR. QUIGLEY: I don't think it is. He wouldn't have
23 come here without it.

24 THE COURT: Right. He didn't get a benefit from the
25 safe harbor. It is a protection if he comes, but --

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1 MR. QUIGLEY: I think it is a fair argument from the
2 defense, but I don't think it needs to be relayed in the jury
3 charge.

4 MR. SCHWARTZ: I am thinking about that for the first
5 time. I didn't realize when your Honor referred to safe harbor
6 before, I think safe passage --

7 THE COURT: That is what I meant.

8 MR. SCHWARTZ: I get that now. Can we come back to
9 that? I want to reflect on that for a second.

10 THE COURT: Sure. What is next?

11 MR. QUIGLEY: Character testimony I guess we'll fill
12 in with Dr. Archer, right? That is the one character witness
13 we've had. Page 19, Q.

14 THE COURT: Is there going to be any other character
15 testimony?

16 MR. SCHWARTZ: I don't think so, your Honor.

17 MS. NOTARI: Could there be a sentence that a
18 defendant is certainly under no burden to put on character,
19 because this is unusual. We have a situation where one put on
20 character testimony, and perhaps there might be an inference
21 held against Mr. Cooney that, you know, he didn't put on?

22 THE COURT: Why don't we start that paragraph by
23 saying although a defendant is under no obligation to offer any
24 testimony or present any testimony or something like that, you
25 have heard the testimony of Dr. Archer. You have heard the

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1 testimony -- you have heard testimony --

2 MR. SCHWARTZ: Mr. Archer.

3 THE COURT: -- that Mr. Archer has a good reputation.

4 MR. SCHWARTZ: For honesty and trustworthiness.

5 MR. QUIGLEY: Reputation for honesty and
6 trustworthiness is fine with us.

7 THE COURT: Okay.

8 MR. SCHWARTZ: Also Michelle Morton thinks he is cute.

9 THE COURT: Yes. What is next?

10 MR. QUIGLEY: I know your Honor asked about specific
11 investigative techniques on Page 20. I think I would just ask
12 that we reserve on that until after closing. I don't know what
13 arguments they're going to make. This has been some suggestion
14 of when people were interviewed and stuff, but let's see where
15 that goes.

16 THE COURT: I will reserve on that. The language is
17 okay?

18 MR. QUIGLEY: Yes. Just to confirm, I don't think
19 there are any testimonial stipulations.

20 MR. SCHWARTZ: That is my memory. There are fact
21 stipulations and there are document stipulations.

22 MR. QUIGLEY: On the substantive instructions --

23 THE COURT: The stipulation --

24 MR. QUIGLEY: -- is fine as-is.

25 THE COURT: Fine as-is?

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1 MR. QUIGLEY: On the substantive instructions,
2 Paragraph 2 A, Page 23 under indictment, I think the final
3 paragraph of that is duplicative of the rest of the charge.

4 To find the defendants guilty, you must find the
5 government proved the specific charges in the indictment.
6 There is no other charges or crimes referenced in this charge.
7 The jury is instructed they have to find that the government
8 proved beyond a reasonable doubt each of the elements of the
9 offenses. I think that just invites jury speculation and it is
10 duplicative.

11 MR. SCHWARTZ: I think the jury has heard evidence of
12 all sorts of other crimes and insinuations of other crimes, and
13 so it is appropriate to remind the jury that in order to find
14 the defendants guilty, they have to find the defendants guilty
15 of the crimes that are actually charged in the indictment.

16 MR. QUIGLEY: That is what the whole instructions are
17 about, the charges contained in the indictment.

18 THE COURT: I am just going to leave that in. It is
19 self-evident, but I also don't see the harm.

20 MR. QUIGLEY: Page 25, Paragraph V, consider each
21 defendant and each count separately. In addition, some of the
22 evidence was admitted against only one defendant. Let me
23 emphasize that any defendant -- solely admitted against one
24 defendant. That is confusing in light of the charge of
25 reasonable foreseeability. I don't think there has been any

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1 real independence 404 (b) type evidence that was not related to
2 the conspiracy as a whole. We would move to strike that.

3 THE COURT: Was there any evidence?

4 I am asking defense counsel now, that was limited to
5 only one defendant?

6 MR. SCHWARTZ: Well, to my memory, there was not
7 evidence that came in an instruction that was limited to one
8 defendant. There was no 404 (b) limiting instruction given for
9 anything, as I recall, which is why there was no prior bad acts
10 charged in here, which I think is appropriate.

11 There certainly was a lot of evidence that only
12 related to one or two of the defendants. Your Honor gave an
13 instruction in the middle of trial with respect to one of
14 those. I certainly agree it is tied to the notion of
15 reasonable foreseeability, so it might make sense to put those
16 two charges closer together, but there are separate concepts.

17 One is you can only consider evidence against the
18 defendant if it is an act of an alleged co-conspirator if you
19 determine it was made in furtherance of the conspiracy and it
20 was reasonably foreseeable to them.

21 Then what we're talking about now is the consequence
22 of having made that determination, then that evidence is,
23 therefore, admissible as to one defendant. Just to ground it
24 in the facts of this case, when your Honor gave that specific
25 instruction, it related to things that John Galanis had said to

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1 the WLCC about the demand for further bond issuances. That
2 plainly is evidence that is properly admissible against John
3 Galanis, for whatever it is worth, for something he supposedly
4 said.

5 Our argument would be that was to the extent it
6 happened, not reasonably foreseeable to Mr. Archer, I presume
7 Mr. Cooney and, therefore, not admissible as to them. You need
8 both pieces of the puzzle to complete that thought.

9 MR. QUIGLEY: The whole reasonable foreseeability
10 point is more than adequately addressed in your Honor's later
11 instruction for liability and acts and declarations for
12 co-conspirators. What this instruction is intended to refer to
13 is independent 404 (b) evidence of some prior bad act of one
14 defendant, which is not -- that is not at issue here. The
15 issue is we have charged a conspiracy, whether certain acts of
16 the defendants were reasonably foreseeable.

17 I think what is confusing and prejudicial to the
18 government about it, it suggests to the jury if one defendant
19 did something in furtherance of the conspiracy, they can't
20 consider that against the other defendants. I think having the
21 liability for acts and declarations of the co-conspirators
22 instruction is sufficient to deal with that, what the law is on
23 that issue. Having it in one place is not --

24 MR. SCHWARTZ: I am going to -- I had a thought in my
25 head. It is not a total response to that, so I'll pause.

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1 THE COURT: All right. Let me look at the reasonable
2 foreseeability section and then I'll decide if we need this in
3 addition or if it is confusing.

4 MR. SCHWARTZ: That is fine. Can I just say what was
5 in my head because otherwise I'll lose it.

6 I said a second ago that there was no 404 (b) evidence
7 put in. I think that's right. There was evidence that the
8 government had moved on under 404 (b) that sort of a little
9 teeny bit came in and didn't come in pursuant to any
10 instructions. Does it really come in? I don't know how
11 they're going to argue it.

12 Depending on how they argue it, it may be appropriate
13 to have a similar act or a prior bad acts, subsequent bad act
14 charge if we can.

15 THE COURT: What are you referring to specifically?

16 MR. SCHWARTZ: Specifically I am thinking about the
17 so-called Wisconsin bonds, which is at least, as laid out in
18 the government's motion prior to trial, was going to be another
19 scheme which they said was to similar effect to misappropriate
20 the proceeds of a different bond issuance from a different
21 consortium of tribal related entities.

22 To my memory, and they put in stuff that wasn't read
23 in so it may be buried in there, but to my memory, the only
24 time any evidence of that was really put in front of the jury
25 so far was a single email in which Jason Galanis sort of lays

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1 out a plan for a further bond issuance without, obviously, any
2 discussion of misappropriating funds.

3 THE COURT: That was focused on the interest payments,
4 right?

5 MR. SCHWARTZ: No, no.

6 THE COURT: Is that right?

7 MR. SCHWARTZ: This is totally different.

8 MR. QUIGLEY: Without backing away from our position
9 as to what the facts were, the Wisconsin bonds is something we
10 haven't emphasized certainly in the trial. It is not something
11 I do not see us emphasizing in summation.

12 MR. SCHWARTZ: All I am saying is if they argue it in
13 a way that is unexpected to me, and it sounds unexpected to Mr.
14 Quigley, we revisit it at that time.

15 MR. QUIGLEY: No objection to revisiting.

16 THE COURT: That is fine. We'll revisit it.

17 I will tell you right now I am inclined to take this
18 paragraph out. I do think it is confusing in light of the way
19 the evidence has come in. As I said, I'll take a closer look
20 at the reasonable foreseeability section.

21 MR. QUIGLEY: You were intending to take it out?

22 THE COURT: I will probably take out this paragraph,
23 but as I said a moment ago, I will look at the reasonable
24 foreseeability section first before I decide for sure.

25 MR. QUIGLEY: Thank your Honor.

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1 Then our next substantive comments on the material
2 facts section on Page 30, material facts on Page 30, really it
3 is on Page 31 and it is the paragraph beginning a material fact
4 is the one that a reasonable person or reasonable investor
5 would consider important in making his or her investment
6 decision. Here the indictment charges a fraud on both the
7 purchasers of the securities, the pension funds, but more
8 directly the sellers of the securities in terms of the WLCC.
9 So I think the investor language should be replaced with,
10 "person" and --

11 THE COURT: Just a material fact is one that a
12 reasonable person would consider important in making his or her
13 investment decision?

14 MR. QUIGLEY: A decision in connection with purchase
15 or sale of securities.

16 THE COURT: Making his or her decision in connection
17 with the purchase or sale of securities, is that what you said?

18 MR. QUIGLEY: Yes, or decision regarding the purchase
19 and sale of securities, but something that doesn't refer to
20 just an investment decision.

21 MR. SCHWARTZ: I don't think that is right. The case
22 law on securities fraud is unanimous, and using the reasonable
23 investor language, and there are often cases where the alleged
24 misrepresentations were made to an issuer or a seller of
25 securities. So the locution, I take it the point the locution

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1 is a little bit weird, but the legal standard is just
2 unambiguous.

3 If you want to say in here the alleged misstatements
4 were directed towards the WLCC and the customers of Atlantic
5 and Hughes, I don't have a problem with that. The legal
6 standard is the reasonable investor standard.

7 MR. QUIGLEY: The statute deals with the fraud in
8 connection with the purchase and sale of securities. Here we
9 allege both purchase and sellers were defrauded. I think it is
10 confusing to speak only of the purchaser.

11 THE COURT: Is the WLCC not an investor? Tell me
12 factually how this would be confusing for the jury.

13 MR. QUIGLEY: Because they didn't invest any of their
14 own money. The point was they were induced to issue bonds.

15 THE COURT: They were invested in an annuity?

16 MR. QUIGLEY: They thought, your Honor, I think, I
17 think reasonable person would just be more -- we are not going
18 to obviously argue that there was -- I think it is confusing
19 to, given the facts.

20 Yes, I take your point they were investing in an
21 annuity or they were told they were going to invest in an
22 annuity. When I read this at first glance and being familiar
23 with the case for the last six months, I read it as somebody
24 who's buying the Wakpamni bonds, which is only the -- and the
25 jury is not as steeped in the case as people here, will be

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1 similarly confused.

2 THE COURT: I think the language you cited, Mr.
3 Schwartz, is accurate and what is used in the case law. Tell
4 me again what you would propose in terms of adding language to
5 clarify this?

6 MR. SCHWARTZ: To the extent you believe that is
7 somehow confusing -- I don't believe it is -- then if -- and
8 this is throughout the charge. It is already in there, and I
9 think if you look, you'll see that it is already in there. If
10 you want to be clear that in this case the alleged
11 misstatements are directed towards the customers of Atlantic
12 and Hughes and the WLCC, then that is fine.

13 I do want to be clear about one thing. While the WLCC
14 did believe that they were investing in an annuity, the annuity
15 is not a security upon which the securities fraud charge here
16 is based.

17 MR. QUIGLEY: Right.

18 THE COURT: That is a fair point.

19 MR. QUIGLEY: I agree with Mr. Schwartz on that.

20 That goes to our point that the security at issue here
21 is the bonds. So it is fraud in connection with the purchase
22 or sale of the WLCC bonds. Frankly, I think that supports kind
23 of neutralizing this language and talk about persons and not
24 investors.

25 MR. SCHWARTZ: You can say a reasonable investor,

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1 comma, which could be a buyer or seller or buyer and issuer or
2 something like that.

3 MR. QUIGLEY: I guess similarly in the second -- I
4 have struck out here in this section any time it says investor,
5 person. Then the other change I would have is in the paragraph
6 beginning in considering whether a statement or omission was
7 material, the second sentence of that paragraph, it does not
8 matter whether the actual person who purchased or sold the
9 bonds to capture the WLCC and again the statutory language
10 regarding fraud in connection with the purchase or sale of a
11 security.

12 MR. SCHWARTZ: I don't have a problem with purchase or
13 sold. Again it ought to say investor and not person. I think
14 the government is inviting error by suggesting your Honor use
15 reasonable person instead of reasonable investor, which is the
16 standard.

17 THE COURT: Is there a way to clarify who the investor
18 was to make it just for Mr. Schwartz's point? Is there a
19 clause we can put in after reasonable investor to avoid any
20 confusion?

21 MR. SCHWARTZ: Correcting the sentence that the
22 government was just concentrating on probably does it if you
23 say it does not matter whether the actual investor who
24 purchased or issued the bonds.

25 MR. QUIGLEY: Then maybe a sentence after the first

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1 full paragraph on that page beginning with material fact,
2 something after that sentence.

3 Here the government alleges that the investors are
4 both the WLCC who issued the bonds and the pension funds on
5 whose behalf, the pension fund clients of Hughes and Atlantic
6 on whose behalf the bonds are purchased.

7 THE COURT: We would leave the material fact paragraph
8 alone, but then we would add a sentence at the end that says
9 here the government alleges that the investors are both the
10 WLCC which purchased the funds.

11 MR. QUIGLEY: Issued the bonds.

12 THE COURT: Sorry. Who issued the bonds. I am sorry.
13 I misspoke. WLCC which issued the bonds and the pension fund
14 clients of Hughes and Atlantic on whose behalf the bonds were
15 purchased?

16 MR. QUIGLEY: Certain of the bonds were purchased.

17 THE COURT: On whose behalf certain of the bonds were
18 purchased. Is that right?

19 MR. QUIGLEY: Yes.

20 MR. SCHWARTZ: Say it one more time.

21 THE COURT: We add a line that says here the
22 government alleges the investors are both the WLCC which
23 purchased the bonds and the pension fund clients of Hughes and
24 Atlantic on whose behalf --

25 MR. TOUGER: (Inaudible)

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1 MR. SCHWARTZ: Issued.

2 THE COURT: What did I say?

3 Here the government alleges the investors are both the
4 WLCC, which issued the bonds. I am sorry if I misspoke, I am
5 reading from the transcript, and the pension fund clients of
6 Hughes and Atlantic on whose behalf certain of the bonds were
7 purchased.

8 MR. QUIGLEY: I am thinking out loud about this.

9 THE COURT: I can print that line that you just read
10 if that is helpful.

11 MS. NOTARI: That would be helpful.

12 THE COURT: Can you print that line and hand it to all
13 of them? Thanks.

14 MR. QUIGLEY: Instead of here the government alleges,
15 and I know I suggested that language, I would propose an
16 introductory clause in assessing materiality, the relevant
17 investors are the WLCC who issued the bonds and the pension
18 fund clients.

19 MR. SCHWARTZ: Well, it is always -- thank you -- it
20 is always a little difficult when we start wordsmithing like
21 this, but it is important to ground the charge in the facts so
22 the jury knows what we are talking about.

23 When you talk about materiality, it is the
24 hypothetical reasonable investor and not these particular
25 investors, so I worry about having too much in this part of the

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1 charge connected to the specific facts in the case. If the
2 government thinks there is something confusing again, I don't
3 think it is confusing, and I think it could be corrected by
4 referring generally, as I said, to investors who were
5 purchasers or issuers.

6 If something more specific your Honor believes is
7 necessary, that is fine. When this section becomes too
8 fact-bound, you really risk confusing the jury in the other
9 way, which is suggesting that materiality is subjective when it
10 is objective, and that is the whole purpose of this section of
11 the charge.

12 MR. QUIGLEY: Give us one second, your Honor.

13 THE COURT: Sure.

14 (Pause)

15 THE COURT: I will note that I am not going to charge
16 on the defense theory of the case, and for the same reason it
17 may be appropriate to stay away from what the government
18 alleges for the same reason.

19 MR. SCHWARTZ: I am not sure I understand that. The
20 charge talks almost exclusively about what the government
21 alleges.

22 THE COURT: It talks about what is in the indictment.

23 Beyond what is in the indictment, I am not marshaling
24 the evidence. I am just saying what the indictment alleges,
25 which is what they have to decide whether it is proven or not,

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1 but I think once I get into saying what the government alleges
2 this, when I am not going to do the same with respect to what
3 the defense case is, what the defendant's position is, that may
4 be troublesome.

5 MR. SCHWARTZ: Two things to that.

6 One is that I would ask for an opportunity to talk to
7 my co-counsel and see if we can propose language that meets
8 that concern, and the second is if your Honor nonetheless
9 adheres to that view, I would then feel very strongly that the
10 indictment should not go back into the jury room because the
11 indictment is incredibly fact-bound. If they have a document
12 back there that is the government's factual allegations spelled
13 out over 30 pages and nothing from the defense, I think that
14 that would be deeply unfair.

15 MR. TOUGER: Mr. Schwartz brought that up now. I was
16 going to bring that up later. Unlike most federal indictments
17 which are very scant on facts, very bland, this one is very
18 fact-intensive, and I think that would make it, as Mr. Schwartz
19 said, very improper to go back into the jury room because it is
20 just the statement of the charges, it is almost like a
21 complaint in some ways.

22 THE COURT: Look, this is why I asked if you had an
23 objection to the indictment going back when I started today.

24 MR. TOUGER: When I went back and looked at it, I
25 think it is almost like a complaint more than an indictment.

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1 MR. QUIGLEY: It is helpful for the indictment to go
2 back to the jury, your Honor. It didn't sound like anybody had
3 any objections. We hadn't focused on it too much especially in
4 a case like this where the jury will be instructed that the
5 indictment is not evidence. It is simply the allegations that
6 the government has to prove beyond a reasonable doubt, so I
7 think equipping the jury to make the decisions as to whether
8 the government has proven certain allegations, it is helpful
9 for them to have those allegations.

10 MR. TOUGER: I think it is unfair in this case because
11 it is sort of a rehashing of the government's case in general
12 and it is not just the charges. If you want to put back the
13 statute, that is another question, but this indictment is not
14 just a restatement of the charges, it is very fact --

15 THE COURT: What I think is fair, one of two things,
16 either send back the indictment and then do instruct on the
17 defense theory of the case, or I don't send back the
18 indictment. Obviously, chunks of the indictment are quoted in
19 the charge and they will have the charge, but they won't have
20 the whole indictment. I think that that is the fair
21 resolution.

22 MR. QUIGLEY: If we can think about it and let your
23 Honor know later today. It didn't sound like anybody had an
24 objection earlier today. We are in the process of redacting it
25 as we speak.

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1 THE COURT: Why don't you do this. Why don't you
2 provide a redacted copy of the indictment to defense counsel
3 later today and to me. Then just, if you all just let me know,
4 you can let me know Monday morning, but let me know, all of
5 you, if your preference is to have both, that I instruct on the
6 defense theory of the case and I send back the indictment, or I
7 do neither, in which case just the quotes that are contained in
8 the charge will go back with the charge but not the indictment,
9 okay?

10 MR. SCHWARTZ: Thank you.

11 MR. QUIGLEY: Back to?

12 THE COURT: Going back to this language.

13 MR. QUIGLEY: Yes. I think in the Taglifari case,
14 your Honor used the reasonable person formulation in the first
15 sentence. A material fact is one that a reasonable person
16 would have considered important in making his or her investment
17 decision. I think just for a lead-in sentence saying
18 reasonable person would be appropriate, and then in the next
19 paragraph, as we had suggested, who purchased or issued the
20 bonds, not just who purchased.

21 THE COURT: If I don't want to change the language
22 from reasonable investor to reasonable person, is there
23 anything else you think I should do in the first paragraph?

24 I will add it. I will add the "or issued" after "who
25 purchased" in the second full paragraph on 31, but if I think,

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1 look, the standard is a reasonable investor, is there anything
2 else I can do to clarify that?

3 MR. QUIGLEY: Then instead of investment decision, at
4 least in one of the investment decision statements, we would
5 say decision regarding the sale or purchase of securities to
6 make it -- because both of those are investment decisions.

7 MR. SCHWARTZ: Say it again.

8 MR. QUIGLEY: Instead of investment decision, a
9 decision regarding the sale or purchase of securities, which
10 are both adding forms of investment decisions, but it is a
11 little bit broader.

12 MR. SCHWARTZ: That is fine.

13 THE COURT: So the first line, the first full
14 paragraph, would read a material fact is one that a reasonable
15 investor would consider important in making his or her
16 investment decision regarding the sale or purchase of a
17 security or securities?

18 MR. QUIGLEY: Of securities.

19 THE COURT: Does anyone have an objection to that?

20 MR. SCHWARTZ: No, your Honor.

21 THE COURT: Why don't we do that and then we'll add
22 "or issued" in the next paragraph after, "who purchased or
23 issued."

24 MR. QUIGLEY: On the conspiracy charge, Page 40, in
25 the first section, conspiracy to commit securities fraud, the

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1 sentence beginning on Page 40, however, you must find each
2 defendant not guilty of conspiracy unless the government proves
3 all elements of conspiracy beyond a reasonable doubt. I think
4 the issue here is each defendant. The jury is instructed
5 elsewhere to consider each defendant separately.

6 THE COURT: Why don't we say, however, you must find
7 the defendant you are considering not guilty of conspiracy
8 unless the government proves all of the elements of a
9 conspiracy beyond a reasonable doubt, okay?

10 MR. QUIGLEY: That is fine with us.

11 THE COURT: Off the record.

12 (Off-the-record discussion)

13 THE COURT: Go on. Back on the record.

14 MR. QUIGLEY: That is all we have, your Honor.

15 THE COURT: Okay. Defense counsel?

16 MR. QUIGLEY: Just to clarify on deliberations of the
17 jury, you indicate you are going to send back the exhibits?

18 THE COURT: Am I going to send back the exhibits?

19 MR. QUIGLEY: Yes.

20 THE COURT: Yes.

21 MR. QUIGLEY: We'll start getting that ready now.

22 THE COURT: Right.

23 MR. SCHWARTZ: I have one comment on that.

24 When we had discussed this before, I think we had said
25 that you would include language making clear to the jury

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1 although they were getting all of the exhibits, they could
2 still ask questions about specific exhibits.

3 THE COURT: I thought I did that, but maybe --

4 MR. SCHWARTZ: It could be me. I am worried about if
5 the jury remembers one particular bit of evidence, but they
6 didn't write down what exhibit it is. We lose two days as they
7 go searching for something that someone remembers. That is
8 why, honestly, it is better not for all the exhibits to go back
9 and they can just ask for whatever they want.

10 THE COURT: I will send them all back what I added,
11 but I am happy to add in more language if you like, Page 52 and
12 3 A, right to see evidence in communication with the Court. You
13 are about to go into the jury room and begin your
14 deliberations. I will send back all the exhibits to the jury
15 room, but feel free to ask for any items as well.

16 Do you want me to clarify that?

17 MR. SCHWARTZ: "If you need help locating any specific
18 exhibits" or whatever, your Honor.

19 THE COURT: If you want to ask for specific items --

20 MR. SCHWARTZ: In other words --

21 THE COURT: You may have trouble locating?

22 MR. SCHWARTZ: It makes it clear you can ask for
23 something else, but you can ask for us to help you with what we
24 have stuck in there.

25 THE COURT: I will just say please feel free to ask

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1 for specific items you may have trouble locating.

2 MR. QUIGLEY: That is fine.

3 THE COURT: Any other objections from defense counsel?

4 MR. SCHWARTZ: I have a few comments.

5 THE COURT: Go ahead.

6 MR. SCHWARTZ: Would you prefer I go through the pages
7 or talk first about the charges that your Honor did not include
8 that I would like to revisit?

9 THE COURT: Either way.

10 MR. SCHWARTZ: Let me talk about the big, some of the
11 big-picture issues first.

12 One, your Honor did not include a multiple
13 conspiracies charge. In this case the government charged a
14 multi -- not technically a multi-object conspiracy, but they
15 charged a conspiracy that had two distinct acts of securities
16 fraud as its objects: One, the undisclosed conflicts to the
17 investors of Atlantic and Hughes; and two, the
18 misappropriation of the WLCC bond funds. I think there is more
19 than ample evidence for a jury here to determine that those
20 were entirely separate conspiracies, so I think it is
21 appropriate to give that charge here.

22 THE COURT: Do you want to be heard?

23 This actually, I am happy to hear you out today and if
24 you want to submit a letter on this, I am happy to read your
25 letters if you think that would be useful. If there is nothing

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1 that you want to add, this is sufficient.

2 MR. QUIGLEY: We are happy to put in a letter. I
3 think this kind of dovetails with the reasonably foreseeability
4 argument. The defendants on trial, the issues of Atlantic and
5 Hughes were not reasonably foreseeable to them, that is not the
6 basis the jury can convict them on the conspiracy. I don't
7 think there is a basis or a multiple conspiracies charge is
8 appropriate here. If you want to hear from us in a letter, we
9 are happy to do that.

10 THE COURT: I think on this issue, I don't think I
11 need to hear you out on any other issue in writing, but on the
12 multiple conspiracy issue, it would be helpful to get a letter.

13 MR. SCHWARTZ: We are happy to do it.

14 Just so Mr. Quigley has the benefit of my initial
15 reaction when he puts in his letter, the argument he just made
16 is circular, right, because you only get to reasonable
17 foreseeability if you already determine that there was a
18 conspiracy and that this was an act in furtherance of the
19 conspiracy by a co-conspirator. You can't consider that in
20 determining whether there was a conspiracy and what the
21 conspiracy was in the first place.

22 Here the question is, was there one conspiracy or were
23 there multiple conspiracies, and the reasonable foreseeability
24 issue we were talking about doesn't feed into that. That goes
25 into whether there was a meeting of the minds and what the

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1 conspirators allegedly agreed to. So we should just bear that
2 in mind when we submit our letters.

3 MR. QUIGLEY: To that, I think this would be frankly a
4 closer question if perhaps -- we'll put it in writing.

5 THE COURT: All right. If you can both get your
6 letters by Monday, that would be helpful. I don't obviously
7 expect the charge to be before Wednesday earliest, but still.

8 MR. QUIGLEY: That is fine.

9 MR. SCHWARTZ: Next, your Honor has chosen not to
10 include a separate charge on the fact that the jury cannot
11 infer guilt from association or guilt as a result of position.
12 That concept --

13 THE COURT: I think I do have the concept of guilt by
14 association in the charge.

15 MR. SCHWARTZ: It is there, but only in respect of
16 specific things. You can't infer that someone joined a
17 conspiracy just because they were adjacent to it. I will talk
18 about some of my specific comments.

19 Given the way the evidence has come in here, it is
20 appropriate to have those two charges, especially the guilt by
21 virtue of position, which is not there at all. That is
22 particularly important in light of the sort of countervailing
23 issue, which is that your Honor has chosen to include a
24 conscious avoidance charge.

25 I think that that is, with respect, not appropriate on

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1 the facts of this case. There is no factual predicate here for
2 giving that charge. There is no fact that I think the jury has
3 been presented any evidence about that there is an argument
4 that any defendant willfully blinded themselves to it.

5 If the government thinks otherwise, we invite them to
6 proffer what that is, but that evidence has not been presented
7 to the jury. This is a straight case about active knowledge on
8 the government's part and on the part of the defendants. They
9 didn't know and they were duped or at least with respect to Mr.
10 Archer.

11 So I don't think conscious avoidance plays any part in
12 this case. I don't think there is a factual predicate for it,
13 but if the government makes a proffer, and your Honor
14 determines otherwise, it is particularly important to have
15 those other two charges in there because certainly the jury
16 should not be in a position of not being presented the complete
17 understanding of the law there, which is in cases where there
18 is an appropriate factual predicate for conscious avoidance,
19 you still cannot infer guilt by virtue of association or
20 proximity or position, and there has been a lot of evidence
21 about proximity and position, and my view is no evidence of
22 conspiracy or criminal intent.

23 MR. QUIGLEY: Taking those in response in order, your
24 Honor, on Page 45 of your charge, it adequately discusses the
25 mere presence, mere association is not a sufficient basis to

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1 find membership in a conspiracy. I don't think a stand-alone
2 charge about position or anything like that is necessary.

3 On a conscious avoidance, we think it is entirely
4 appropriate in this case. I would point the court, I
5 appreciate the court has included it, but the Cuti case, 720
6 F3d. 453, 464 and 465, discusses how the elements certainly,
7 the first element of conscious charge is that knowledge is in
8 dispute. Here, as your Honor has said and is true, knowledge
9 is whether the defendants knew they were participating in a
10 scheme with respect to these bonds is the critical issue in
11 this trial. I think there are, with respect to the second
12 element --

13 MR. SCHWARTZ: Hold on a second. I don't mean to
14 interrupt. That is not a fact one can consciously avoid.

15 One cannot consciously avoid knowing they were part of
16 a scheme to misappropriate the proceeds of the bonds. That is
17 an element of conspiracy which your Honor instructs is not
18 susceptible to conscious avoidance. There has to be an active
19 meeting of the minds, active intent to join the conspiracy.

20 Similarly, with respect to the substantive securities
21 fraud, there has to be intent to deceive, intent to defraud,
22 which is also not susceptible to conscious avoidance. That
23 only comes into play with respect to facts, and that is what I
24 don't understand the government's theory what fact --

25 MR. QUIGLEY: The Cuti case uses an example.

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1 For example, in a securities fraud case, if a
2 defendant attended meetings that were part of the charged
3 scheme, it argued he lacked the requisite scienter because he
4 didn't read in full the documents he signed. The charge is
5 appropriate. That is similar to the facts in this case.

6 Another quote from the Cuti case, purported knowledge
7 despite the defendant's deep involvement in the transactions
8 that effectuated the fraud all but invited the conscious
9 avoidance charge.

10 Here we have John Galanis who is at the forefront of
11 the fraud, he is involved in drafting these documents and
12 claiming that he -- he claims he was entitled to a finder's
13 fee, which is nowhere in the documents. That in and of itself
14 supports a conscious avoidance charge.

15 With respect to Mr. Archer and Cooney, there is
16 evidence he was aware Jason Galanis didn't just have 15 or \$20
17 million to give it to buy bonds. We saw emails about the need,
18 for Galanis' need for discretionary liquidity, his summer cash
19 hole, about investing, suggesting the bond proceeds were going
20 to be invested in his apartment, and that was an email from Mr.
21 Archer, that bond proceeds would be invested in Wealth
22 Assurance Holdings.

23 While those facts certainly support an inference of
24 actual knowledge that they participated in a fraudulent scheme,
25 again in the Cuti case and other decisions in the Second

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1 Circuit has been very clear those same facts can support a
2 predicate for conscious avoidance charge. Given the disputed
3 issues about knowledge in this case and the defendants'
4 involvement in the transactions that effectuated the bond
5 fraud, we don't think this is a close question on conscious
6 avoidance.

7 MR. SCHWARTZ: The issue is the second part of the
8 conscious avoidance test. Of course, there is no disagreement
9 we are contesting knowledge. The question is whether there is
10 any evidence of conscious avoidance.

11 The thing Mr. Quigley just said, I don't think they
12 actually support the inferences he is drawing, but those are
13 all evidence of actual knowledge, not conscious avoidance.
14 Nothing what was just said is suggesting conscious avoidance.

15 There was a reference to not reading documents or
16 something like that. That is not conscious avoidance. I point
17 your Honor to United States against Tusman, in which Judge
18 Gardephe in December refused to give a conscious avoidance
19 theory and expressly distinguished this exact argument the
20 government was making about Cuti, and what he said was it has
21 to be consciously avoided.

22 It is not just I was really busy, I was flying around
23 the world, I had a lot of going on, I do M&As. It has to be
24 more than that. It can't be just I'm busy. That is the
25 argument we have put forward. I will hand up to your Honor the

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1 extensive discussion on the record in the Tusman case where
2 Judge Gardephe talked about this and distinguished all the
3 cases, and he ultimately didn't give that charge. There is
4 simply no factual predicate here.

5 MR. QUIGLEY: In reading documents from the Second
6 Circuit in Cuti, they said in a securities fraud case, if a
7 defendant attended meetings as part of the charged scheme, he
8 argues he lacked the requisite scienter because he didn't
9 bother to read in full the documents he signed, the charge is
10 appropriate. Cuti, C U T I, citing United States versus
11 Ebbers, 458 F.3d at 124 and 125.

12 Here with respect to the second part of the conscious
13 avoidance charge, the facts in dispute are the defendants know
14 the bonds proceeding were going to be inappropriate. Did they
15 know they were participated in a fraud? There are facts that
16 clearly put them on notice of that that we have outlined.

17 Many of the emails we read in, John Galanis'
18 participation in drafting the documents for the bonds, aware
19 there was no \$2.3 million finder's fee due to him under those
20 documents and, yes, Mr. Schwartz is right, those facts could
21 also support actual knowledge, but again the Second Circuit in
22 Cuti discusses this as well. It has been clear the same facts
23 can support actual knowledge can be used as --

24 THE COURT: I think what would be useful, I know you
25 have a lot of work to do, in that letter adding conscious

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1 avoidance charge and your interpretation of the law, and I will
2 read the cases that you have cited today.

3 MR. TOUGER: I would just add that as far as
4 Mr. Galanis is concerned, there is only one meeting that
5 involved Mr. Galanis, and that is the first meeting in Las
6 Vegas, and the testimony is clear nothing was decided at that
7 meeting whatsoever.

8 There is no document that John Galanis writes after
9 that, I don't know what they're talking about John Galanis
10 writing. There is not one document he writes. He edits and
11 reviews documents, and we are not saying he did. There is no
12 evidence that John Galanis, nor will I make an argument that
13 John Galanis didn't see or didn't do. That is not the case
14 here.

15 John Galanis did exactly what he did. There is no
16 evidence whatsoever that he consciously avoided anything or
17 stuck his head in the sand on anything. I don't understand
18 where there is no email that we're going to say no, that is not
19 John Galanis. There is nothing like that here.

20 MR. QUIGLEY: Among other documents for Mr. Galanis, I
21 refer the court to Government Exhibit 1304, which is the final
22 source of use of funds for the first issuance sent by
23 Mr. Galanis, but obviously we'll put it in a letter.

24 MR. TOUGER: There is no doubt he sent that letter and
25 that he has knowledge of that. We are not saying he didn't.

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1 He didn't write that. The evidence is clear Mr. Anderson
2 wrote, wrote most of the documents here.

3 THE COURT: Why don't you guys put these in your
4 letters with respect to conscious avoidance. The question I do
5 want to ask, though, is with respect to the proposed charge
6 regarding participation from association.

7 I did give an instruction when the guilty pleas of
8 Morton, Jason Galanis and Hirst were admitted, and I do wonder
9 if I should reiterate something about that, about other
10 defendants. We have the standard instruction about persons not
11 on trial and you're not supposed to speculate. Is there
12 somewhere else that I should mention that?

13 MR. QUIGLEY: There is an instruction, I don't
14 honestly know if it is in here, but is often given with
15 cooperators.

16 MR. TOUGER: It is in there.

17 MR. QUIGLEY: It says that if somebody else pled
18 guilty --

19 THE COURT: But that is only in the cooperator
20 section. I wonder, we can take out -- maybe we have a
21 different section -- we can take out that line that is not
22 duplicative from the cooperator section and just have a line
23 about the fact you have heard testimony about certain
24 individuals who have pled guilty to related offenses and then
25 essentially reiterate what I said during the course of the

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1 trial.

2 MR. QUIGLEY: I think we would be fine with that.

3 The decision of a witness to plead guilty was a
4 personal decision about his or her own guilt and may not be
5 used against you in any way as evidence. I would say just
6 given that it came in as 806 evidence, as impeachment, it says
7 here against or unfavorable to any defendant. I would say
8 favorable or unfavorable to any defendant inasmuch as it would
9 be inappropriate for the defendants to argue or even suggest
10 that, hey, the really guilty people here plead guilty.

11 That is the one modification we want to make to that
12 instruction.

13 THE COURT: I will take a look at that and I will
14 distribute a revised draft. So, Mr. Schwartz, you talked about
15 multiple conspiracies?

16 MR. SCHWARTZ: So I am not sure we had proposed a
17 separate charge on it, but is a related concept to the multiple
18 conspiracies, but we had proposed language about the need for
19 the jury to be unanimous as to essentially the theory if they
20 were to convict.

21 Perhaps your Honor has solved that in part through
22 adoption of the defense proposed verdict sheet. We haven't
23 seen a verdict sheet here. I think it is important that the
24 jury be charged on that concept where the government has
25 multiple different theories, both legal theories and factual

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1 theories here, and it is critical that the jury understand that
2 they need to be unanimous on one in order to convict.

3 MR. QUIGLEY: The securities fraud count includes
4 language to that effect, that you must be unanimous on Page 28
5 as to what type of unlawful conduct, if any, you are
6 considering, if any, the defendant you are considering
7 committed. We don't think any language beyond that is
8 necessary or appropriate.

9 MR. SCHWARTZ: Where is that?

10 MR. QUIGLEY: Page 28, under the first element of
11 fraudulent acts, we don't think any -- I am not sure that is
12 necessary, but it is included in many securities charges,
13 and --

14 THE COURT: It says on the bottom of 28, you must be
15 unanimous as to which type of unlawful conduct, if any, the
16 defendant you are considering committed.

17 MR. SCHWARTZ: Read in context, though, that is
18 referring to, in essence, which of the subsections of 10b-5 the
19 jury is considering as opposed to the actual sort of theory of
20 fraud. That language is meant to say you all have to agree
21 either it was a scheme or artifice to defraud or
22 misrepresentation, but half of you can't say it was a scheme or
23 artifice and the other half can't say it was a material
24 misrepresentation. That is what I take the language to be in
25 there now.

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1 There is a broader concept with the way the government
2 has charged this case and the way it will argue this case with
3 numerous different theories of liability. The jury has to be
4 unanimous as to which one, if any, is appropriate.

5 MR. QUIGLEY: I think the charge in here is fine
6 as-is. I don't think anything beyond that is appropriate. I
7 think, frankly, the verdict form, the defendants' proposed
8 verdict form, in my 11 trials as an AUSA, it is unlike anything
9 I have ever seen. I don't think the jury has to reach that
10 level of specificity or have special findings even with respect
11 to, say, primary liability and aiding and abetting liability.
12 There is case law saying the jury doesn't have to be unanimous
13 with respect to that.

14 The jury has to be unanimous the fact the defendant
15 committed the offense charged. They don't have to agree on the
16 precise factual predicate. There is case law out there
17 supporting that as well.

18 THE COURT: Do you disagree, just to clarify, do you
19 disagree with Mr. Schwartz's statement that the jury needs to
20 be unanimous on the theory?

21 MR. QUIGLEY: I disagree with that, yes. The jury
22 does not need to be unanimous on the theory. They need to be
23 unanimous whether the defendant committed the offense charged.

24 MR. SCHWARTZ: That is not right. Look at the example
25 we were just talking about, the fact there were two alleged

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1 sets of victims here, the WLCC and the clients of Atlantic and
2 Hughes. What if six jurors believe that the WLCC was defrauded
3 and induced into issuing these bonds, and those same six jurors
4 absolutely disagree that there was anything wrong with respect
5 to the clients of Atlantic and Hughes, and the other six jurors
6 have the exact opposite reaction, they believe beyond a
7 reasonable doubt that the clients of Atlantic and Hughes were
8 duped, but not the WLCC.

9 In that case, they would all be unanimous that the
10 defendants were guilty and they would all be unanimous the
11 defendants were innocent, but on the government's theory, that
12 would be sufficient to convict, and that is not right.

13 MR. QUIGLEY: That is not the law.

14 The case law is a general unanimity instruction is
15 sufficient, there does not need to be special findings about
16 which theory or which facts -- there are numerous cases about
17 this, *Shad v. Arizona*, 501 U.S. 64, a jury need not be unanimous
18 on the theory of liability. This is like black letter law. I
19 don't think Mr. Schwartz is right at all.

20 THE COURT: All right. We have added one more topic
21 to your letter, all right?

22 Then I understand you proposed the charges about
23 defendants' position and about internal compliance policies.

24 MR. SCHWARTZ: I think that is probably no longer
25 relevant since the investment adviser counts are out and those

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Charge Conference

1 defendants are out.

2 THE COURT: Did you want to go through any specific
3 objections you had?

4 MR. SCHWARTZ: There are two other big picture things.
5 One, and this is minor but important to me, as I
6 understand it, you're going to send copies of the jury charge
7 back into the jury room. If that is so, I would ask that your
8 Honor revert to not capitalizing the G in government or
9 capitalizing the D in defendants.

10 THE COURT: That is fine.

11 MR. SCHWARTZ: Second, I just want the record to be
12 clear, I do not understand the government in this case to be
13 seeking a forfeiture of any specific assets. I understand them
14 only to be pursuing, in the event of conviction, substitute
15 assets theory. In the event that the government is seeking
16 forfeiture of any specific assets, I do ask that be submitted
17 to the jury under Rule 32.2.

18 MR. QUIGLEY: It hasn't been a focus of mine. I don't
19 think the indictment contains any specific allegation. There
20 is a general allegation.

21 MR. SCHWARTZ: I want to be clear. I am making the
22 request. The government has to decide now, otherwise they lose
23 the ability to seek forfeiture of specific assets.

24 MR. QUIGLEY: We are not seeking forfeiture of any
25 specific assets per the indictment.

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1 MR. SCHWARTZ: As to specific counts, some of these
2 are small. You have under Section H what is and is not
3 evidence.

4 MR. QUIGLEY: Under general instructions.

5 THE COURT: Page 10.

6 MR. SCHWARTZ: The third paragraph you talk about
7 things that are not evidence, including exhibits marked for
8 identification, materials used to refresh a witness's
9 recollection. I don't know if your Honor wants to make
10 reference here to the various demonstrative aids to the jury.

11 THE COURT: Sure.

12 MR. QUIGLEY: That is fine with us, your Honor.

13 THE COURT: Okay.

14 MR. SCHWARTZ: I join in Mr. Touger's request in the
15 general instruction about direct and circumstantial evidence,
16 to either include the language that he proposed about
17 essentially the tie goes to the defense when there are
18 different inferences, or there needs to be some other language
19 about such as what we had originally proposed about the fact
20 that there are strong and weak inferences and there are
21 multiple inferences that can be drawn from the evidence, and
22 that is the nature of circumstantial versus direct evidence.

23 THE COURT: Right now it reads there are times when
24 different inferences may be drawn from the evidence. The
25 government asks you to draw certain inferences, the defendants

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Charge Conference

1 ask you to draw another. It is for you and you alone to decide
2 what inferences you will draw.

3 MR. SCHWARTZ: Right. Then you go to the example, and
4 the example really only compels one conclusion.

5 THE COURT: Here I don't have an example after that.
6 This is Page 12, the last paragraph.

7 MR. TOUGER: That is where the United States v. Glenn
8 says that if there is a tie, it goes to the runner basically.

9 THE COURT: Yes.

10 MR. QUIGLEY: We oppose that.

11 THE COURT: I am not inclined to add that language. I
12 will read Glenn before I make a decision and then I will look
13 at other charges.

14 MR. SCHWARTZ: Under L, law enforcement and government
15 employee witnesses, I think it should just be you have heard
16 testimony from a law enforcement official.

17 THE COURT: That is fine. That is a good point. I
18 guess we had the special agent doing the reading, but he didn't
19 really testify.

20 MR. QUIGLEY: That is why we left it alone, your
21 Honor.

22 MR. SCHWARTZ: Again I wouldn't want them to be
23 confused about the FINRA witness.

24 THE COURT: About?

25 MR. SCHWARTZ: The FINRA witness.

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1 THE COURT: That is fine. I will just say you have
2 heard testimony from a law enforcement official.

3 MR. SCHWARTZ: So in the cooperating witness charge,
4 in the third paragraph, there is a line, the last line, indeed,
5 it is the law in federal courts that the testimony of a single
6 cooperating witness may be enough in itself for conviction if
7 the jury believes that the testimony establishes guilt beyond a
8 reasonable doubt.

9 Obviously, that is a correct statement of the law, but
10 I submit that on the somewhat unusual facts of this case, it
11 would be really misleading because -- and I don't think the
12 government would disagree -- they could believe every single
13 word that Hugh Dunkerley said, and it would not supply guilt
14 beyond a reasonable doubt as to any of the defendants, and so
15 the suggestion that believing Hugh Dunkerley means conviction
16 is wrong. In fact, all of us have embraced the truth of, if
17 not everything, certainly the gravamen of Hugh Dunkerley's
18 testimony.

19 THE COURT: I think that is a fair point in the
20 context specifically of this case, so I will take out that
21 line.

22 MS. NOTARI: Which line?

23 THE COURT: On Page 15, the last line, the first full
24 paragraph. I think we have a similar line in there in the
25 immunity section.

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1 MR. SCHWARTZ: Yes, I agree.

2 MR. QUIGLEY: That one, there was testimony from Mr.
3 Martin about Mr. Cooney, so I would -- and McMillan about
4 Galanis, so I think that certainly with respect to Mr. McMillan
5 about Mr. Galanis --

6 THE COURT: Do you think that Mr. McMillan's testimony
7 could convict Mr. Galanis on its own, and the same with respect
8 to Martin for Cooney?

9 MR. QUIGLEY: Certainly with respect to, yes, I think
10 definitely with respect to Mr. McMillan with respect to John
11 Galanis. He testified that he was, the way he set up this
12 account and disbursed the bond proceeds, I think that is the
13 standard instruction and it is appropriate there.

14 MS. NOTARI: I would note the only testimony that Mr.
15 Martin had against Mr. Cooney was that there was a phone call
16 that he received saying Mr. Jason Galanis was arrested in the
17 Gerova case. That absolutely could not be used to convict Mr.
18 Cooney in this case. That is ridiculous.

19 MR. QUIGLEY: I am paraphrasing, but it had nothing to
20 do with the independent bonds or Wakpamni. I think that is --
21 look, I take -- I realize that in and of itself -- I think a
22 lot about this. That is probably fine with respect to Cooney.

23 THE COURT: I note, I know this was cited in a
24 different case suggested and I took it out. On the specific
25 facts of this case, it is fair to take out that language, and I

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1 think since I took it out of cooperation in addition and there
2 is some questions with respect to the particular immunized
3 witnesses here, I am going to take that out. So that is the
4 last sentence on 16 will read you are instructed the government
5 is entitled to call a witness granted immunity by an order of
6 this Court.

7 Then I will say, however, the testimony -- just say
8 the testimony of such a witness should be examined closely to
9 determine whether or not it is colored in such a way as to
10 place guilt upon the defendant in order to further the
11 witness's own interests. If you believe the witness's
12 testimony to be true and determine to accept the testimony, you
13 may give it such weight, if any, as you believe it deserves.

14 MR. QUIGLEY: That is fine with us.

15 THE COURT: That is what the immunized witness charge
16 is going to read.

17 MR. SCHWARTZ: Then still the general instructions, X,
18 we talked a little bit about deferring on the investigative
19 techniques, which I am fine on. The use of recordings, text
20 messages and emails charge I think should come out.

21 If it stays in, it needs to be changed. It has been
22 the defense in this case, which has introduced text messages at
23 least first, not solely, has introduced recordings and things
24 like that, and so if this charge is going to stay, it needs to
25 be balanced. I would suggest it come out. I don't think

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1 anyone is going to argue that any of the evidence in this case
2 was improperly obtained.

3 THE COURT: Do you agree with that, given both sides
4 used the same kind of evidence?

5 MR. QUIGLEY: I do to some extent. I considered
6 raising this. My issue is that given kind of most, if not all,
7 but many of the recordings and emails the defendants have
8 introduced have been their own statements. Obviously, the
9 government got its emails and text messages through.

10 THE COURT: I will take out the fact it was the
11 government that used this evidence. The use of this evidence
12 is entirely lawful.

13 (Continued on next page)
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Charge Conference

1 MR. QUIGLEY: That's fine with us.

2 MR. SCHWARTZ: You can wait until after the closings.

3 I suggest it should come out. I have tried to keep this issue
4 out. I spoke to the government, and we even redacted the Bates
5 numbers that referenced the search warrant. I just don't think
6 that has a place in this case.

7 MR. QUIGLEY: I just think, your Honor, all that's out
8 there with massive state surveillance, there may be a juror who
9 is hung up about that.

10 THE COURT: I will think about that.

11 MR. SCHWARTZ: If that juror exists, they are not
12 going to be overcome by --

13 THE COURT: In any event, I will take out the
14 reference to the government's use. I will just say "the use is
15 entirely lawful," so it will apply to both parties.

16 MR. SCHWARTZ: Then under substantive instructions,
17 2B, "summary of the indictment," so in the, I guess, fourth
18 paragraph the one that begins "the indictment alleges," I'm
19 using the red line, so my page numbers don't work. I'm sorry.
20 So just tell me --

21 MS. NOTARI: 24.

22 MR. SCHWARTZ: Tell me when you are there.

23 THE COURT: Yes, page 24.

24 MR. SCHWARTZ: So six lines down, there is a
25 reference, it says, "And to fraudulently cause clients of

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Charge Conference

1 investment advisory firms to buy certain of those bonds." I
2 would ask that "investment advisory firms" to be changed to
3 reference specifically Atlantic and Hughes. Again, I don't
4 want there to be any confusion with the other investment
5 advisors, especially Burnham Asset Management.

6 MR. QUIGLEY: That's fine with us.

7 THE COURT: I'm sorry. What did you say?

8 MR. QUIGLEY: That's fine with us, the change, to use
9 the firms Hughes and Atlantic.

10 THE COURT: Okay.

11 MR. SCHWARTZ: There is, in the knowledge, intent, and
12 willfulness charge for securities fraud, there is -- the final
13 paragraph is essentially conscious avoidance. Obviously if
14 conscious avoidance comes out, that should come out. I suggest
15 it should come out as repetitive anyway.

16 MR. QUIGLEY: Sorry, what paragraph?

17 MR. SCHWARTZ: It is the last paragraph of knowledge,
18 intent, and willfulness. And I think it is -- I think it is
19 very confusing there, and I think conscious avoidance generally
20 is very confusing in fraud cases where the mental state
21 required to convict is knowledge, intent, and willfulness, and
22 so to end this part of the charge and the conscious avoidance
23 note suggests that conscious avoidance is sufficient for the
24 jury to find the requisite mental state to convict on
25 securities fraud, and that's plainly not the law. Conscious

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Charge Conference

1 avoidance relates only to knowledge, but not to intent or
2 willfulness. You can't consciously avoid intending to defraud
3 someone. You can't consciously avoid willful misconduct. So
4 even if conscious avoidance stays in as a charge, I believe
5 that that paragraph should be removed.

6 THE COURT: All right. I will consider that when I
7 consider, you know, your conscious avoidance letters.

8 MR. SCHWARTZ: Then in the conspiracy charge, under
9 the second element, looking at the fourth paragraph beginning
10 "it is not necessary for the government to show."

11 THE COURT: All right, or the last paragraph on page
12 44.

13 MR. SCHWARTZ: Five lines down there is a sentence
14 that begins "in fact, a defendant may know only one other
15 member of the conspiracy."

16 THE COURT: Yes.

17 MR. SCHWARTZ: I think that that should not be "know."
18 A defendant may have conspired with only one other member of
19 the conspiracy." But that sort of goes to the same point that
20 I was making before about guilt by association, but especially
21 if that charge is not going to be in there as a standalone, it
22 is important to distinguish between simply knowing someone.
23 There is no dispute that these defendants knew at least certain
24 of the admitted conspirators. And having conspired --

25 THE COURT: Got it.

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Charge Conference

1 MR. QUIGLEY: I think in context, Judge, that the
2 instruction is clear and they still have to find that they
3 joined the conspiracy. This is about their knowledge. I think
4 it is a standard charge.

5 THE COURT: We can say "the fact the defendant may
6 know and conspire with only one other member of the conspiracy
7 it may still be considered."

8 MR. TOUGER: I think and know and conspire has to be
9 in.

10 THE COURT: Anything else?

11 MR. SCHWARTZ: There is language in here and right now
12 I am only finding it in the context of the conscious avoidance
13 charge, but it is elsewhere, talking about essentially the
14 absence of bad faith, where it says "it is not sufficient to
15 show the defendant was merely negligent, foolish, or mistaken,"
16 and I think in this case, at least with respect to two of the
17 defendants, a theory of the defense is that they were actively
18 deceived, and I would add that that concept be included to the
19 list of things that are insufficient.

20 MR. QUIGLEY: Sorry, what are we looking at?

21 MR. SCHWARTZ: I'm fine. I can put in a letter.

22 THE COURT: He wants the concept somewhere in the
23 charge about the fact that two defendants were actively
24 deceived and/or that guilt by association is not enough or
25 guilt by virtue of your position in your company is not enough.

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1 I know there is a good faith exception.

2 MR. QUIGLEY: If there is a good faith exception, your
3 Honor, then, again, the "mere presence" language I think is
4 encompassed in the general -- in the conspiracy charge.

5 THE COURT: All right. I'm going to look at the
6 charge as a whole and see if there is anywhere that it is
7 appropriate to put those concepts in.

8 MR. SCHWARTZ: And then finally, on the "duty to
9 deliberate" charge, at the end, and I appreciate that this is
10 likely your Honor's standard charge --

11 THE COURT: It's a lot of judges' standard charge.

12 MR. SCHWARTZ: Yes.

13 There were three sentences at the beginning of the
14 third paragraph that I think had been, I believe, agreed to by
15 both parties, if I recall, in the original joint requests to
16 charge that I think ought to be restored. They said -- this is
17 the paragraph that now begins "it is your duty as jurors to
18 consult with one another."

19 THE COURT: Yes.

20 MR. SCHWARTZ: Before that it said, "The verdict must
21 represent the considered judgment of each juror. In order to
22 return a verdict, it is necessary that each juror agree to the
23 verdict. Your verdict must be unanimous."

24 THE COURT: I'm happy to add that. I do think that is
25 in here, but I'm happy to add it and have it be a little

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1 repetitive.

2 MR. SCHWARTZ: Thank you, your Honor. That's all I
3 have.

4 THE COURT: So I will get the letter -- obviously,
5 Ms. Notari, if you have anything you want to add --

6 MS. NOTARI: I just want to make sure the record
7 reflects that we join in all of Mr. Schwartz's objections.

8 THE COURT: Mr. Touger, do you have anything you want
9 to add.

10 MR. TOUGER: No. I think I have said everything.

11 THE COURT: So the letter I want you to address
12 multiple conspiracies, I want you to address conscious
13 avoidance, and then I want you to address the unanimity point
14 which bears on the verdict sheet in particular. It may also
15 bear on the charge, but what do we really need to know from
16 them or not. And then, as I said, there are a couple small
17 things I will think about, and I will send you an updated
18 draft, but we will be thinking about if there is anywhere there
19 that it is appropriate to add in the notion of guilt by
20 association or position. And, again, you are going to let me
21 know about the indictment and the defense theory or neither.
22 As I noted earlier, I'm inclined to do either neither or both.

23 MR. QUIGLEY: If you are going to send the charge back
24 that has the statutory allegations --

25 THE COURT: Exactly, I think it has all the overt acts

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Charge Conference

1 in it, right?

2 MR. QUIGLEY: It does in the statute.

3 MR. SCHWARTZ: Is that the government expressing a
4 preference for neither?

5 MR. QUIGLEY: No. We are just make sure we were aware
6 of all the options.

7 MR. SCHWARTZ: We are going to get a proposed redacted
8 indictment first so that we can consider this issue in the --

9 MR. QUIGLEY: Why don't we -- we will decide and
10 rather than spending -- if we decide not to send the indictment
11 back, rather than spending hours redacting it, we will just let
12 everyone know that.

13 MR. SCHWARTZ: Okay. We will talk, too. We may
14 prefer to do it the other way, but we will talk.

15 THE COURT: You can talk and take a close look at the
16 charge and what from the indictment is in the charge and then
17 think about is that sufficient if I were not to send the
18 indictment back, but then I also wouldn't present the defense
19 theory of the case in the charge.

20 MR. QUIGLEY: Okay. I think the one thing I said was
21 in there, but now I realize it may not be, is the overt acts.

22 MR. SCHWARTZ: I think they are in there.

23 THE COURT: I think they are in there.

24 MR. SCHWARTZ: They are quoted in there.

25 MR. QUIGLEY: Okay. Fair enough.

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1 THE COURT: Yeah. Sorry. I feel like I just looked
2 at them. Here. So it is on the bottom of 46, there are six
3 overt acts that were alleged in the indictment.

4 MR. QUIGLEY: Got it. Thank you, your Honor.

5 THE COURT: Okay. So I will see you on Monday
6 morning.

7 MS. NOTARI: Your Honor, I just wanted --

8 MR. TOUGER: What time, your Honor?

9 THE COURT: 9, 8:45 in case there are any issues and
10 there are any other evidentiary issues I need to address.

11 MS. NOTARI: So these e-mails I am handing you, these
12 exhibits are in addition to what I have given you with the
13 other outstanding issue which was the big round number exhibit.
14 These are some that we are in dispute about.

15 THE COURT: Okay.

16 MR. QUIGLEY: Obviously I'm not familiar with what
17 Ms. Mermelstein was reviewing with Ms. Notari.

18 MS. NOTARI: So I want to hand those up.

19 THE COURT: Are they hearsay objections just so I know
20 when I read them?

21 MR. QUIGLEY: I honestly don't know. That was between
22 Ms. Mermelstein and Ms. Notari. With respect to Mr. Archer,
23 they did send us, I think, a final list of exhibits that they
24 intend to introduce last night, so we are going through those.
25 There may be a few more objections, so we are trying to work it

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Charge Conference

1 out in the first instance and let your Honor know.

2 MS. NOTARI: And I need to review over the weekend
3 what hasn't been put in and also in light of what Mr. Archer
4 put in there may be more.

5 THE COURT: Again, I need time to review things, so I
6 need to know what the objections are. I don't want to give you
7 more work to do. If you can write just a really brief letter
8 just letting me know what's in dispute and what the objection
9 is, you don't have to write a whole brief on every exhibit, but
10 I need to hear that from both of you ideally later today or
11 Saturday so I can look at it before Monday morning. And attach
12 the exhibits.

13 MS. NOTARI: Okay.

14 MR. QUIGLEY: Okay.

15 THE COURT: If I don't have them you can e-mail them
16 to chambers, that's fine, but whatever is easier for you.

17 MR. QUIGLEY: Okay. Thank you.

18 MS. NOTARI: I think the ones that I have given you
19 are pretty straight forward. It's just --

20 THE COURT: That's fine. I'm going to assume the
21 objection is hearsay, but I will look at them and then I will
22 see you Monday at 8:45.

23 We are going to go all day Monday. We are going to go
24 into summations. You all are going to decide who is going to
25 go first, to the extent there is time for a defense summation.

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Charge Conference

1 Then we are going to do Tuesday from 1 to 5. That may require
2 us to excuse alternate No. 13, so I want to get your okay on
3 doing that. We can decide this Monday morning if we have to
4 make her come in, but it seems to me that if we already have
5 three other alternates, that to not spend the four hours on
6 Tuesday would be a shame.

7 MR. QUIGLEY: Yeah, I don't think we object o that,
8 your Honor, given where we are in the trial.

9 MR. SCHWARTZ: I think that's fine, given where we are
10 at trial.

11 MR. TOUGER: I just have to get Mr. Galanis's
12 approval.

13 THE COURT: So we will decide it Monday morning.

14 MR. SCHWARTZ: I think the one minor scheduling thing
15 we would ask for, I doubt very much this would be an issue, but
16 on the off chance that on Monday we both complete all of the
17 evidence and the government's principal summation and one
18 defense summation that we be able to start fresh on Tuesday
19 with the second defense summation so no one has to split.

20 THE COURT: Yeah, I'm not going to make someone split.
21 I don't want to make you split, but I also don't want to waste
22 two hours if you think that you are going to be two hours and
23 15 minutes.

24 MR. SCHWARTZ: I can't imagine that happening.

25 THE COURT: So we will see where we are. And I'm

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1 going to suggest -- I'm going to order them lunch on Monday and
2 take a shorter lunch break, and we can take the short bathroom
3 breaks, but we will keep those short, okay?

4 MR. QUIGLEY: Okay.

5 MR. SCHWARTZ: I will hand to your Honor's clerk --

6 THE COURT: I'm also going to ask them if they can
7 stay a little longer on Monday which may be -- which is my
8 preference.

9 MR. TOUGER: Just thinking in my head, I think we will
10 be able to get through the government's summation and one
11 defense summation on Monday without trying to work --

12 THE COURT: If that's the case, then that's fine.

13 MR. TOUGER: If everything goes as schedule.

14 THE COURT: Okay. We will see where we are. Thanks.
15 Have a good weekend.

16 (Adjourned to Monday, June 25, 2018 at 8:45 a.m.)
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